

<sup>2</sup> The SALJ listed the only issue as, “Whether the claimant is entitled to an increase or decrease of the prior award issued September 22, 2009.” Review and Modification Award (Sept. 15, 2009) at 2. There was no award issued on September 22, 2009. Presumably the SALJ was referring to the agreed Award entered by ALJ Nelsonna Potts Barnes on September 22, 2000.

The Board has considered the record and adopted the stipulations listed in the Review and Modification Award. In addition, the Board has considered the transcript of the Motion Hearing held December 14, 2000, with exhibits; the transcript of the Post-Award Medical Hearing held February 14, 2002, with exhibits; the transcript of the Post Award Medical Hearing held September 12, 2002, with exhibits; the transcript of the Post Award Hearing held September 28, 2004, with exhibits; the transcript of the Evidentiary Deposition of C. Reiff Brown, M.D., held April 15, 2005, with exhibits; the transcript of the Evidentiary Deposition of Pedro A. Murati, M.D., held May 11, 2005, with exhibits; the transcript of the Motion Hearing held June 21, 2005, with exhibits; the transcript of the Evidentiary Deposition of George G. Fluter, M.D., held June 21, 2005, with exhibits; the transcript of the Evidentiary Deposition of Chris D. Fevurly, M.D., held September 7, 2005, with exhibits; the independent medical examination (IME) report of Dr. C. Reiff Brown dated April 11, 2002, filed with the Division on May 14, 2002; the IME report of Dr. J. Mark Melhorn dated October 1, 2002, filed with the Division on October 8, 2002; and the IME report of Dr. Brown dated November 18, 2004, filed with the Division on November 24, 2004.

### ISSUES

Respondent argues that SALJ Valerius had no jurisdiction to rule on claimant's Application for Review and Modification because he sought modification of a post-award order entered on April 2, 2003, not the agreed Award entered on September 22, 2000. Respondent further argues that the number of weeks available for a shoulder injury, 225 weeks, had passed more than six months before claimant's Application for Review and Modification was filed. In the event the Board finds it has jurisdiction of this appeal, respondent asserts that claimant did not prove an increase in impairment to his left shoulder injury, arguing that any additional left shoulder impairment is related to claimant's non-work related bicycle accident. Next, respondent contends that the SALJ miscalculated the review and modification award. Respondent agrees with the SALJ's Award denying claimant an impairment to his cervical spine. Respondent contends that claimant's previous request for post award medical treatment to his cervical spine was denied by the Board, that decision was not appealed by either party, and it is now the law of the case.

Claimant argues that his Application for Review and Modification was filed in this docketed claim and, therefore, both the SALJ and the Board have jurisdiction. Claimant argues that he has not been paid for 225 weeks of impairment and, therefore, is entitled to a review and modification of his award. Claimant requests the SALJ's award for an increase to his left shoulder be affirmed. Further, claimant requests that the Board modify the Review and Modification Award to include an impairment of function to the neck, which would be an impairment to the body as a whole, increasing the number of compensable weeks from 225 to 415.

The issues presented by the parties for the Board's review are:

(1) Did the SALJ lack jurisdiction because claimant's Application for Review and Modification sought to modify a post award medical order entered April 2, 2003, rather than the original agreed Award entered September 22, 2000? Respondent did not raise this issue either to Administrative Law Judge Nelsonna Potts Barnes at the regular hearing or to the SALJ. This issue is being raised by respondent for the first time in this appeal to the Board.

(2) Has the time elapsed for claimant to ask for review and modification of the award because the number of weeks available for an impairment to the shoulder passed more than six months before the Application for Review and Modification was filed?

(3) Did claimant prove an increase in the impairment to his left shoulder beyond the impairment found in the original Award? If so, was the increase in impairment related to his work-related injury of October 22, 1998, or to his non-work related bicycle accident of May 1998?

(4) Is claimant estopped or prevented by the doctrine of res judicata from receiving an impairment for his cervical spine because of either the agreed Award or the Board's December 5, 2006, Order that affirmed ALJ Potts Barnes' Post Award Medical Order finding that claimant failed to prove he needed treatment to his cervical spine as a result of his October 1998 accident? If not, has claimant proven that he has suffered an impairment to his cervical spine as a result of his October 1998 accident and what is the amount and extent of that impairment?

(5) Did the SALJ miscalculate the amount of permanent partial disability compensation due in the Review and Modification Award?

In addition, the record presents an issue concerning the jurisdiction of Mr. Valerius to enter an order in this case as a special administrative law judge.

#### **FINDINGS OF FACT**

Claimant was originally injured in a non-work related accident in May 1998, when he fell while riding his bicycle and suffered a fracture dislocation of his left shoulder. He was treated by Dr. Michelle Klaumann, who performed surgery on the shoulder in May 1998. Claimant was off work until August 15, 1998, when he returned to work with restrictions.

Claimant testified that his supervisor refused to allow him to work within his restrictions. On October 22, 1998, claimant was lifting something at work when the pain in his left shoulder got significantly worse and he could barely lift his arm. Claimant was seen by several doctors, including Dr. John Estivo, who rated him as having a 5 percent permanent partial impairment to his left upper extremity, and Dr. Pedro Murati, who rated him as having a 22 percent impairment to the left upper extremity. Dr. Murati also found

that claimant had a cervical strain, which he rated at 4 percent to the whole body. Claimant settled his workers compensation claim with respondent, and an agreed Award was entered on September 22, 2000, giving claimant a 13.5 percent impairment rating to his left upper extremity, which was a split of the upper extremity ratings of Drs. Estivo and Murati. There was no mention in the agreed Award of claimant's claim concerning his cervical spine.

After the entry of the agreed Award, claimant filed seven applications for post award medical and one application for preliminary hearing, which was treated as an application for post award medical. ALJ Potts Barnes issued several orders related to claimant's applications, including an Order of April 2, 2003, in which she held that claimant was entitled to additional medical treatment for his left shoulder. The latest Application for Post Award Medical was filed on July 15, 2004, and requested treatment for claimant's cervical spine and temporary total disability benefits if he was taken off work. On September 6, 2006, ALJ Potts Barnes denied claimant's application, finding he failed to establish his current need for medical treatment for his cervical spine was causally related to his work-related injury of October 22, 1998. The ALJ's Order was appealed to the Board, which affirmed the ALJ, finding:

. . . claimant has failed to prove he needs treatment to his cervical spine as a result of his October 1998 accident or the resulting left shoulder surgery. Nevertheless, the medical evidence establishes that claimant has neck pain and left upper arm pain due to referred pain from the muscles of the shoulder girdle. Accordingly, this Post Award Medical order should not be construed to prohibit claimant from receiving any appropriate physical therapy or medications for that referred muscle pain.<sup>3</sup>

The Board's Order was not appealed.

On December 31, 2003, claimant filed an Application for Review and Modification of the decision entered April 2, 2003. He specifically asked for modification of permanent partial disability benefits.<sup>4</sup> That application is the subject of this appeal. A prehearing settlement conference was held on November 17, 2008. The review and modification hearing was held March 24, 2009, before ALJ Potts Barnes. Claimant testified concerning his various doctors visits and treatment, including surgery to replace part of his shoulder in 2003. He testified that he had some improved movement in his shoulder after the surgery. He said his left shoulder is about the same now as it was after the surgery, although the grinding in the shoulder is somewhat worse. Claimant also testified that he believes his left shoulder injury has affected his right shoulder and his neck. He said he has two blown discs in his neck, and his neck has gotten worse over the years, especially

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<sup>3</sup> *Kerby v. Boeing Company*, No. 250,409, 2006 WL 3891425 (Kan. WCAB Dec. 5, 2006).

<sup>4</sup> K-WC E-5, Application for Review and Modification, filed December 31, 2003.

on his left side. ALJ Potts Barnes set claimant's terminal date to be April 24, 2009, and respondent's terminal date to be May 26, 2009. On April 22, 2009, ALJ Potts Barnes, by agreement of the parties, extended claimant's terminal date to May 8, 2009, and respondent's terminal date to July 20, 2009. On June 8, 2009, respondent's terminal date was again extended to August 7, 2009. Claimant filed his submission letter on September 10, 2009. Respondent did not file a formal submission letter but simply sent ALJ Potts Barnes an email setting forth its positions on the issues.

### **PRINCIPLES OF LAW**

An award may be modified when changed circumstances either increase or decrease the permanent partial general disability. The Workers Compensation Act provides, in part:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review, the administrative law judge may appoint one or two health care providers to examine the employee and report to the administrative law judge. The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitation provided in the workers compensation act.<sup>5</sup>

K.A.R. 51-19-1 states in part:

(a) When there has been an application for review or appeal upon an award and the same is either affirmed or modified, application for review and modification pursuant to K.S.A. 44-528 may still be made to the division. Initial hearings on such applications shall be conducted by an administrative law judge.

(b) Application for review and modification pursuant to K.S.A. 44-528 shall set forth at least one of the reasons contained therein.

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<sup>5</sup> K.S.A. 44-528.

K.S.A. 44-528 permits modification of an award in order to conform to changed conditions.<sup>6</sup> If there is a change in the claimant's work disability, then the award is subject to review and modification.<sup>7</sup>

In a review and modification proceeding, the burden of establishing the changed conditions is on the party asserting them.<sup>8</sup> Our appellate courts have consistently held that there must be a change of circumstances, either in claimant's physical or employment status, to justify modification of an award.<sup>9</sup>

The effective date for any modification shall be the date of the increase or diminishment in the functional impairment or work disability except that the effective date shall not be more than six months before the date the application for review and modification was filed.<sup>10</sup>

K.S.A. 2008 Supp. 44-523 states in part:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

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(c) When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within 30 days. The administrative law judge shall not stay a decision due to the absence of a submission letter. When the award is not entered in 30 days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director or to a special administrative law judge who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within 30 days following submission by the party and assign it to an assistant director or to a special administrative law judge for immediate decision based on the evidence in the record.

K.S.A. 2008 Supp. 44-551 states in part:

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<sup>6</sup> *Nance v. Harvey County*, 263 Kan. 542, Syl. ¶ 1, 952 P.2d 411 (1997).

<sup>7</sup> *Garrison v. Beech Aircraft Corp.*, 23 Kan. App. 2d 221, 225, 929 P.2d 788 (1996).

<sup>8</sup> *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 531, 598 P.2d 544 (1979).

<sup>9</sup> See, e.g., *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978); *Coffee v. Fleming Company, Inc.*, 199 Kan. 453, 430 P.2d 259 (1967).

<sup>10</sup> *Ponder-Coppage v. State*, 32 Kan. App. 2d 196, 198-99, 83 P3d 1239 (2002).

(a) The duties of the assistant directors of workers compensation may include but not be limited to acting in the capacity of an administrative law judge.

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(i)(1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. . . .

....  
(k) In case of emergency the director may appoint special local administrative law judges and assign to them the examination and hearing of any designated case or cases. Such special local administrative law judges shall be attorneys and admitted to practice law in the state of Kansas and shall, as to all cases assigned to them, exercise the same powers as provided by this section for the regular administrative law judges. Special local administrative law judges shall receive a fee commensurate with the services rendered as fixed by rules and regulations adopted by the director. The fees prescribed by this section prior to the effective date of this act shall be effective until different fees are fixed by such rules and regulations.

K.S.A. 2008 Supp. 44-555c(a) states in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

### **ANALYSIS AND CONCLUSION**

The Board finds that the SALJ lacked subject matter jurisdiction to review and modify the Award entered September 22, 2000, for the reason that the claimant's Application for Review and Modification specifically requested review and modification of the order entered on April 2, 2003, not the Award entered on September 22, 2000. The order of April 2, 2003, pertained only to medical treatment, not to permanent partial disability compensation.

In addition, Mr. Valerius lacked jurisdiction and authority to enter his order of September 15, 2009. He is neither an assistant director nor an administrative law judge. The record is devoid of any order by the Director of the Division of Workers Compensation appointing Mr. Valerius as a special administrative law judge and of any order assigning this case to Mr. Valerius for determination.

The Board addressed a similar situation in *Cervantes*,<sup>11</sup> which states in part:

Both K.S.A. 44-523(c) and K.S.A. 2001 Supp. 44-551(d) contemplate that some action shall be taken on the part of the Director to assign a matter to the special administrative law judge either based upon a motion of the parties or based upon the Director's own motion. Both statutes require that the Director shall "assign" the files to the special administrative law judge. The statutes clearly contemplate that any such assignment be in writing with notice provided to the parties.

In this instance, a review of the Director's file, the Administrative Law Judge's file and the Workers Compensation System action codes and docket report fails to uncover any assignment, motion or order from the Director's office. Respondent argues that the statutory assignment requires some written action on the Director's part with notice to the parties and the opportunity to be heard on the assignment. The Board acknowledges that neither K.S.A. 44-523(c) nor K.S.A. 2001 Supp. 44-551(d) specifically indicate a right to notice or a hearing nor do they even mention that the assignment should be in writing. However, the Board agrees with respondent's argument that appropriate notice is required in order for the parties to determine whether a conflict exists between the parties and the Special Administrative Law Judge.

The Kansas Court of Appeals, in *Bradford*,<sup>12</sup> was asked to determine whether the filing of a request for reassignment under K.S.A. 44-523(c) deprived an administrative law judge of jurisdiction to make an award. In *Bradford*, the administrative law judge set terminal dates, as in this case. Submission letters from claimant, respondent and the Kansas Workers Compensation Fund (Fund) were filed with the Division. The last submission letter by the Fund was filed January 23, 1995. On January 20, 1995, claimant filed a written request for the decision to be entered either by the Director or an assistant director, arguing that the administrative law judge had not issued an award, even though the matter had been subject to decision for over three months. The administrative law judge issued the award before a ruling could be made on the claimant's K.S.A. 44-523(c) request for reassignment. The Court of Appeals determined that using K.S.A. 44-523(c) to invalidate an award once it has been entered would be contrary to the administrative economy that the statute is designed to facilitate. The Court, in so ruling, went on to state that the mere filing of a request under K.S.A. 44-523(c) would not act to deprive the administrative law judge of jurisdiction. The Court ruled that the administrative law judge did not lose jurisdiction of the award.

In this instance, the matter is even one step removed from *Bradford*, as no request for reassignment under K.S.A. 44-523(c) has been made by either party. Additionally, there was no determination by the Director's office under K.S.A. 2001 Supp. 44-551(d) that an emergency existed. Indeed, from the documents contained within the file, the only fact that can be gleaned is that the ALJ had failed to enter

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<sup>11</sup> *Cervantes v. Safelite Glass Corporation*, No. 1,012,477, 2006 WL 1275437 (Kan. WCAB Apr. 26, 2006).

<sup>12</sup> *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263 (1996).

an award as required by K.S.A. 44-523(c). Put simply, this record is void of any indication how this matter came to be in the hands of a special administrative law judge. Absent a motion, order or any type of writing indicating this case was assigned to this Special Administrative Law Judge, the Board finds that the Special Administrative Law Judge did not have jurisdiction to make a determination in this matter and, therefore, the Award of the Special Administrative Law Judge dated November 30, 2005, should be set aside and the case remanded to the ALJ for an immediate determination.

The Board is conscious of the waste of resources this finding would have, not to mention the delay. Nonetheless, it is terribly troubling to learn, after the fact, and without any notice, as the parties in this case did, that the case was transferred and decided by another individual in lieu of the ALJ who actually heard the matter. And even more troubling is the fact that the file fails to reflect the existence of the assignment. At a minimum, there needs to be a written document of some sort, coupled with a notice to the parties of the assignment. Absent that minimal paper trail, there is no jurisdiction to hear this matter.

As a result of these findings, the remaining issues are moot.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Review and Modification Award of Special Administrative Law Judge Seth G. Valerius dated September 15, 2009, is reversed and set aside.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**CONCURRING AND DISSENTING OPINION**

I agree with the majority that the purported Special Administrative Law Judge, Mr. Valerius, lacked jurisdiction and authority to decide claimant's application for review and modification. But I disagree that the application is fatally flawed such that the administrative law judge, special administrative law judge, and Board lacked subject matter jurisdiction of the review and modification proceeding.

Here, no surprise, prejudice or lack of due process occurred or is even alleged by respondent. It is apparent from counsel's questioning of the witnesses that permanent partial disability was an issue in this proceeding and that the parties were litigating this claim with that understanding. It seems likely that if this had been a problem, respondent would have thought to raise it as an issue before now. Claimant filed the required Form E-5 Application for Review and Modification in the correct docket number with the correct caption; and in response to the form's question of what modification was being sought under K.S.A. 44-528, claimant specifically answered "permanent partial disability benefits."

As provided in K.S.A. 2008 Supp. 44-523(a):

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

No request was made in that Application for Review and Modification for there to be a review and modification of any past medical treatment orders or for post award medical. The reference to the April 2, 2003, order, which was for post award medical benefits, instead of the original Award order of September 22, 2000, was, in this instance, harmless error.

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BOARD MEMBER

**DISSENTING OPINION**

The undersigned Board Member agrees with the dissenting opinion that the reference to the April 2, 2003, order instead of the September 22, 2000, original Award was, in this instance, harmless error. However, for the reasons contained in my dissent in

*Cervantes*,<sup>13</sup> I disagree that the SALJ lacked jurisdiction to decide the case due to any defect or lack of appointment by the Director.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier  
Seth G. Valerius, Special Administrative Law Judge  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>13</sup> *Cervantes v. Safelite Glass Corporation*, No. 1,012,477, 2006 WL 1275437 (Kan. WCAB Apr. 26, 2006).